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Nos. 576 and 616

In the Supreme Court of the United States

October Term, 1962

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v.

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v.

[redacted]

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 515

RICHARD R. HARSHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 516

MALCOLM LEBERT PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals are reported at 307 F. 2d 590 and 307 F. 2d 585.

JURISDICTION

The judgments of the court of appeals were entered on August 20, 1962, and petitions for rehearing were denied on September 14, 1962. The petitions for writs of certiorari were filed on October 15, 1962,

and were granted on December 17, 1962. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the recommendations of the Department of Justice to the appeal board may have erroneously suggested that mere willingness to work in war-connected activity was, necessarily and in itself, cause for denying petitioners a I–O classification.

2. Whether there were errors in the procedure followed at petitioners' trials.

STATUTE AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set out in Appendix A, *infra*, pp. 30–34.

STATEMENT

Each of the petitioners was convicted in the United States District Court for the Northern District of Illinois of having wilfully refused to submit to induction into the armed forces. Petitioner Harshman was sentenced to imprisonment for thirty months and fined $1,500. Petitioner Parker was sentenced to imprisonment for two years and fined $1,000. The convictions were affirmed on appeal. 307 F. 2d 585 and 590.

Each of the petitioners is a member of the Harshmanite Church of Sullivan, Illinois. Parker has been a member of the sect since childhood and Harshman joined when he was about fourteen or fifteen years of age. In neither proceeding has any question been raised as to the sincerity of each petitioner's belief in the tenets of his church. The question in this

case is whether each petitioner's expressed personal adherence and agreement to those tenets supports his classification as I–A–O (non-combatant military service), rather than as I–O (conscientious objector), although the latter classification was claimed by each petitioner. The pertinent facts on this issue are as follows:

1. Each petitioner, in seeking a I–O classification, stated that he based his claim of conscientious objection to participation in war in any form on the commandment of Christ to love one's enemies and on the fact that he could not be yoked with unbelievers. (H. S.R. 11, 13, 14, 48–49; P.S.R. 9, 11, 13, 14). Each worked for Community Industries, a business established by the church, the chief purpose of which is to provide employment for the members. Harshman worked as an assembler of piece goods in the dress division of the factory (H.S.R. 5–6, 12); Parker worked as a mechanic readying motors for the production line (P.S.R. 5, 10). Each petitioner in the course of the proceedings before the local board offered a letter by the pastor of the Harshmanite Church to the local board stating that the Harshmanites "are in fact willing to produce anything needed by the government when it is engaged in carrying on war. We do not feel that doing so makes us responsible for war or the waging of war. We would not willingly engage in the production of any article used directly to cause death" (H.S.R. 28; P.S.R. 33–34). Each was classified I–A–O by the local board (H.S.R. 2, 8, 61–62; P.S.R. 2, 7, 45–46, 49). Each appealed and in each case the matter

was referred to the Department of Justice for hearing and recommendation.

2. As to Harshman, a hearing was held in October 1956, at which the petitioner, the pastor of the Harshmanite Church in Sullivan, and the Treasurer of Community Industries were present (see H.S.R. 70). According to the recommendation of the Department of Justice, petitioner told the hearing officer that his objections to military training and service was based largely upon the Commandment, "Thou shalt not kill", and that the members of his faith believed in passive resistance and would not kill even in self-defense (H.S.R. 70). He said that the Harshmanites interpreted the Biblical injunction, "Be not unequally yoked with unbelievers", as meaning that they should not associate with anyone not of the Harshmanite faith, and that to do so would make them "responsible in some degree for the actions of such unbelievers which responsibility they refuse to accept" (H.S.R. 70). Although the hearing officer believed that the petitioner was sincere in his religious beliefs, he nevertheless recommended that petitioner be classified I–A–O because the distinction which petitioner attempted to draw between non-combatant participation in war as a civilian and as a member of the armed forces was untenable (H.S.R. 71).

In November 1956, the Department of Justice recommended to the Appeal Board that petitioner be classified I–A–O since he was willing to work in an industry which was engaged in the manufacture of defense products under government contract. The recommendation recited that the petitioner had

worked in the garment division of Community Industries at a time when the company held government contracts to make WAC uniforms, and that the petitioner was presently employed in the Commissary Department of that factory (H.S.R. 69). The recommendation also recited (H.S.R. 71):

> The registrant stated [to the hearing officer] that it is not a violation of their Christian duty to manufacture goods for military consumption but that they do not accept the responsibility for actions of persons who use such products. He said, however, that by becoming members of the armed forces they would become responsible for such actions. The registrant verified that the beliefs and opinions of the Harshmanites in general are also his own personal beliefs and opinions.

The Department expressed the view that petitioner had failed to sustain his claim with regard to noncombatant military training and service.

In a letter to the Appeal Board in December 1956, petitioner claimed that he was entitled to a 1–O classification on the basis of his religious beliefs, and that the local board had not given "unbiased consideration" to his claim inasmuch as, at the proceedings of December 19, 1955, one member of the board allegedly had said that there was "no such thing" as a 1–O classification and the board chairman allegedly had remarked that petitioner would have to leave the country in order to obtain a 1–O classification (H.S.R. 73). Petitioner said that his objection to military service was not based on the Commandment, "Thou

shalt not kill", as expressed by the hearing officer (Mr. Brittingham) (H.S.R. 75). The letter also stated (H.S.R. 75–76):

> I cannot see how my distinction between participation and non-participation in war can be called untenable. As a civilian I am a free man. As a non-combatant member of the armed forces I am in the Army. It's just that plain. * * * I will not willingly become a member of the armed services, making myself in any sense responsible for the actions of that group. * * * If I'm in any way a member of the United States Army then I am participating in war; else it would not be a part of the Armed Forces. In service in the 1–A–O capacity I would wear an army uniform and be under the same articles of war as any other soldier.

On May 10, 1957, the Appeal Board classified the petitioner 1–A–O (H.S.R. 2, 65, 77). The opinion recited (H.S.R. 77):

> This Appeal Board has noted the memoranda of the local board's actions in determining the classification of this registrant and the Appeal Board does not concur with the conclusions of the local board as stated in such memoranda. This Appeal Board is accordingly ignoring those conclusions of the local board. We note, however, that the registrant and others were allowed complete freedom by the local board and by the Hearing Officer of the Department of Justice to place in the registrant's cover sheet any and all information which the registrant wished to file in support of his claim of conscientious objection.

> We have considered the entire Selective Service file of this registrant as explained above. We have also considered the recommendation of the Department of Justice but are not bound by it. We, the Appeal Board have reached the independent conclusion that this registrant, Mr. Richard R. Harshman, is conscientiously opposed to combat training and service as defined in the law. However, we find that he does not actually conscientiously object to non-combatant service as the law defines it. His classification is therefore determined by this Appeal Board to be I–A–O.

3. Petitioner Parker and four others appeared before a Departmental hearing officer (Mr. Brittingham) in the early part of 1957. According to the Departmental recommendation, petitioner told the hearing officer that his basis for conscientious objection to participation in war in any form was the Commandment, "Thou shalt not kill" and the Biblical injunction "Be not unequally yoked with unbelievers" (P.S.R. 51). As to the latter admonition, petitioner said that association with unbelievers "would make them responsible in some degree for the actions of such unbelievers which responsibility they refuse to accept" (P.S.R. 51). The hearing officer was impressed with petitioner's truthful and frank attitude, and believed that petitioner was a sincere member of his church and by religious training and belief was conscientiously opposed to participation in combatant training and service (P.S.R. 52). He concluded that the distinction which petitioner attempted to

draw between participation in war as a civilian and as a member of the armed forces was "too tenuous" for recognition and recommended that he be classified I-A-O (P.S.R. 52).

In June 1957, the Department recommended that petitioner be classified I-A-O because of his willingness to work in an industry which supported the war effort (P.S.R. 50-53). The recommendation recited (P.S.R. 51-52):

> The registrant explained that although Community Industries does not manufacture munitions in the ordinary sense of the word they do manufacture other items for military consumption such as tents, WAC uniforms, candy for army rations and some sort of valve used on Naval vessels and other items. He said that it would not be considered immoral or a violation of their Christian duty to manufacture ammunition and that their reluctance to manufacture munitions is not a matter of religious beliefs but merely a matter of preference. The registrant concluded by verifying that all of the above beliefs and opinions of the Harshmanites, in general, are also his own personal beliefs and opinions.

The Department concluded that, while the petitioner sustained his claim to conscientious objection to combatant military training and service, he failed to sustain his claim with respect to non-combatant training and service.

In a letter to the Appeal Board of July 30, 1957, petitioner disputed a statement in the report that his objection to service was based on the Commandment

not to kill, asserting that his beliefs were based on the New Testament direction to love one's enemies (P.S.R. 56–57). He said that in the non-combat service he would be under a force whose main purpose is killing. He also said (P.S.R. 58):

> At the hearing with Mr. Brittingham one of the members, that was with me brought out the point that during the last world war the boys in our church were given the (4–E) classification which is the same as the (1–O) classification is now. At that time they were manufacturing war goods. It didn't seem to make any difference then if we were doing war work or not. We haven't weakened or changed any in our beliefs, or are we about to now. The goods that we manufactured for use in the Army or Navy could be used by civilians too. The goods that we manufacture is not directly involved in killing and fighting.

In December 1957, the Appeal Board classified the petitioner I–A–O (P.S.R. 2, 7, 49).

DISCUSSION

I

BECAUSE THE RECOMMENDATION OF THE DEPARTMENT OF JUSTICE TO THE APPEAL BOARD MAY HAVE SUGGESTED AN IMPROPER STANDARD FOR CLASSIFYING A REGISTRANT I–O, THESE CASES SHOULD BE REMANDED TO THE DISTRICT COURT TO ENABLE THE UNITED STATES TO DISMISS THE INDICTMENTS

When the government filed its brief in opposition in these cases, it took the position that there was basis in fact for each petitioner's classification in I–A–O in

that each petitioner's beliefs, as reflected in his own interpretation of the position of his sect, showed a willingness to produce goods directly related to the conduct of war. This position finds support in a number of decisions. See, *e.g.*, *Blalock* v. *United States*, 247 F. 2d 615, 619 (C.A. 4); *Meredith* v. *United States*, 247 F. 2d 622, 623 (C.A. 4); *White* v. *United States*, 215 F. 2d 782, 786 (C.A. 9), certiorari denied, 348 U.S. 970; *United States* v. *Van Hook*, 284 F. 2d 489 (C.A. 7), reversed and remanded for resentencing, 365 U.S. 609; *United States* v. *Moore*, 217 F. 2d 428, 434–435 (C.A. 7), reversed on other grounds, 348 U.S. 966; *United States* v. *Querengasser*, 185 F. Supp. 114, 118 (M.D. Pa.).

Upon further study we have concluded that this formula, as applied to the instant cases, may be too rigid. The critical question in determining whether a registrant should be classified I–O or I–A–O is whether—

> he is found to be conscientiously opposed to participation in * * * noncombatant service * * *.

Demonstrated willingness to manufacture munitions, uniforms or other items intended for military use is a relevant factor in appraising the sincerity of a registrant's claim to a I–O classification. It throws doubt upon the profession of conscientious opposition to noncombatant service because such service, judged by normal human standards, is less intimately related to hatred, violence and killing than the manufacture, for profit, of the weapons of war. If a local draft

or appeal board, upon proper recommendations from the Department of Justice and understanding the true nature of the question, should conclude upon such evidence, plus their observation or appraisal of the registrant, that he was not in fact conscientiously opposed to noncombatant service, we would support the classification in court upon the ground that it had a "basis in fact," *Estep v. United States*, 327 U.S. 114, 122.

But the critical question is one of fact—what is the registrant's subjective belief? The statute leaves no room for a rule of law that willingness to engage in defense production is so incompatible with conscientious objection to military service that, despite unquestioned religious sincerity, a I-O classification may not be assigned to any person willing to work upon goods for the armed forces. By the same token, it is impermissible to jump, invariably, and automatically, from evidence of willingness to work on war goods to the conclusion of lack of a sincere conscientious objection to noncombatant service. There may be instances, albeit infrequent, in which a registrant, although he has no scruple in relation to civilian war-connected activity, may nevertheless be conscientiously opposed, by reason of his religious beliefs, to being part of a military organization.

The Department of Justice, in the exercise of its responsibility under Section 6(j) of the Selective Service Act, has concluded that it is not clear from their text that the Department's recommendations in the instant case have observed the essential distinc-

tion just discussed. To avoid similar doubt or ambiguity in the future, the Attorney General, on March 12, 1963, issued a directive setting forth the policy to be followed by hearing officers and members of the conscientious objector unit of the Department of Justice. The directive, reprinted in Appendix B, pp. 35–36, *infra*, states in pertinent part:

> In every case of a claim for exemption from noncombatant service, the ultimate issue is whether the registrant is "conscientiously opposed to participation in * * * noncombatant service" within the meaning of 50 U.S.C. App. § 456(j). This issue does not, of course, arise unless the registrant has established his eligibility for the lesser exemption from combatant training and service by demonstrating that he is "conscientiously opposed to participation in war in any form." In determining the genuineness and sufficiency under the statutory standards of a registrant's claimed beliefs, it is proper for consideration to be given to his attitudes and beliefs regarding participation in defense work as a civilian. Indeed, a registrant's willingness to earn his living by producing materials for the armed forces may of itself provide an adequate basis for concluding that the registrant is not "conscientiously opposed to participation in * * * noncombatant service." However, such evidence does not always or necessarily have that effect. Cases may be readily imagined in which the registrant's beliefs would permit some degree of participation by him in some kinds of defense-related civilian activity, yet still would qualify him for the exemption. The issue is generally whether the registrant is sincere in his claimed

beliefs, and logical inconsistency on his part, while always relevant as a factor to be considered, is not necessarily decisive.

In the two cases at bar, the Selective Service boards, so far as appears, may have proceeded upon a proper appreciation of the nature of the inquiry. We do not imply that their findings lack the necessary support. In both cases, however, the recommendations of the Department of Justice may have been influenced by, and could have been interpreted by the appeal boards as expressing, the view that mere willingness to work in war-connected activity was, in itself, automatic ground for denial of a 1-O classification. While, of course, the recommendation is not binding on the Selective Service boards, this Court has held that, if the recommendation of the Department has been based on an erroneous legal theory, such error sufficiently infects the administrative process to warrant reversal of the conviction. *Sicurella* v. *United States*, 348 U.S. 389–392.

The Department is of the view that its reports in these cases, even if not erroneous as a matter of law, do set forth a more rigid theory than we believe should have been applied in exercising the functions conferred upon the Department by the statute. Under these circumstances, we think that it is appropriate to move the Court to remand the cases to the court of appeals with directions to vacate its judgments and to direct the district court to vacate its judgments and to dismiss the indictments. *Petite* v. *United States*, 361 U.S. 529.

This motion does not imply that petitioners are entitled to be classified 1-O. The correct classifica-

tion remains to be determined by the Selective Service boards and upon recommendations from the Department of Justice (should reclassification proceedings reach that stage) that clearly articulate the decisive question.

In the remaining sections of this brief, we respond to the contentions upon which petitioners have urged that they are entitled to a reversal of their convictions.

II

THERE WAS NO REVERSIBLE ERROR IN THE PROCEDURES AT PETITIONERS' TRIALS

Introduction and Summary

Before discussing the particular points which petitioners raise, we review briefly, by way of general background, the procedure by which a person claiming conscientious objection is classified. In general, the procedure is similar to that set forth in *United States v. Nugent*, 346 U.S. 1, but various changes were made subsequently, some as the result of decisions by the Court.

A person claiming exemption from combatant or non-combatant service fills out the special form for conscientious objectors and files it with the local board. The registrant has the opportunity to supplement his written proofs of conscientious belief with a personal appearance before the local board, so that the board may talk to him and appraise his sincerity. The registrant may appeal to an appeal board in the event that the local board is not convinced of his claim and denies the exemption. If the appeal board makes a

tentative determination that the registrant is not entitled to a I–O classification, it transmits the entire file to the United States Attorney for the federal judicial district in which the appeal board has jurisdiction for the purpose of obtaining an advisory recommendation on the classification from the Department of Justice. 32 C.F.R. 1626.25.

At the Departmental level, an F.B.I. investigation of the registrant is conducted, the registrant is afforded a hearing before a Departmental hearing officer on the claim to exemption, and the Department formalizes its conclusions on the matter of classification in an advisory recommendation sent to the appeal board pursuant to section 6(j) of the Universal Military Training and Service Act. 32 C.F.R. 1626.25. The registrant, prior to his appearance before the hearing officer, receives a résumé of the investigative reports. *Simmons* v. *United States*, 348 U.S. 397. The hearing is held before a hearing officer who is a private attorney volunteering his services without pay. The registrant may bring an advisor to the hearing and may present witnesses as well as his own testimony. The hearing officer makes a report to the Department, which is reviewed, together with the whole record, by the unit within the Department (the Conscientious Objector Section of the Office of Legal Counsel) charged with the administration of the duties imposed by Section 6(j). A letter of recommendation is then prepared by the Department and sent to the appeal board, together with a copy of the résumé of the F.B.I. reports which had previously been given to the

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registrant. The board sends a copy of the letter of recommendation to the registrant so that he may file a reply with the board. *Gonzales* v. *United States*, 348 U.S. 407. The Selective Service file is also returned to the appeal board.

In the Selective Service system, the ultimate responsibility for classification of registrants has been placed by Congress on the appeal boards. As the Court pointed out in *United States* v. *Nugent*, 346 U.S. 1, 9, "it has long been recognized that neither the Department's 'appropriate investigation' nor its 'hearing' is the determinative investigation and the determinative hearing in each case." Thus, Section 6(j) explicitly provides that the appeal board is not required to follow the recommendation of the Department of Justice. Rather, the appeal board acts, according to the regulations, on the basis of all the information that is before it in the file—that is, the entire Selective Service file (including materials offered by the registrant and the summary of his personal appearance before the local board), the written letter of recommendation by the Department of Justice with the résumé of the investigative reports, and the written reply of the registrant to the Department's recommendation. 32 C.F.R. 1626.24.

The issue of proper classification has always been recognized as one to be finally resolved by the responsible local and appeal boards, and not by the district courts, so long as these boards act within the scope of their jurisdiction, follow appropriate procedures, and do not reach conclusions wholly unsupported by any basis in fact. The district court's function in trying

a defendant for refusal to submit to induction is two-fold: first, to determine whether the classifying board has satisfied the procedural and jurisdictional requirements set out above; and, second, if the board has satisfied these requirements, to submit to the jury the question whether the defendant in fact refused to submit to induction. It is no part of the function of the jury to determine the issue of proper classification, and the function of the district judge in this regard is limited to reviewing an administrative record to determine that the board had some basis in fact for its conclusion, acted within its jurisdiction, and fairly applied the established procedures. In addition, there is some scope for trial court review of the procedures and standards applied by the Department of Justice in making its advisory recommendation to the appeal board.

As we have pointed out above, we believe that the Department of Justice recommendations in this case may have suggested to the appeal board that mere willingness to work in war-connected activity is necessarily and in itself the basis for denial of a I-O classification. This possibility makes appropriate a remand of the case to the district court for vacation of the judgments and dismissal of the indictments. We do not believe; however, that there was any error in the proceedings before the district court.

The district court properly refused to hear evidence bearing on the proper classification of petitioners, for this question was one for the appeal board subject to the limited review of the district court.

The district court also correctly refused to order the production of the hearing officer's report to the Justice Department. This report is merely intra-departmental and is not submitted to the appeal board. Moreover, neither petitioner questioned the accuracy of any relevant aspect of the Department's summation of the hearing officer's report when the cases were pending before the appeal board.

Finally, there was no basis for overturning the determination of the appeal board on any of the grounds open for review in the district court. The petitioners were admittedly subject to the jurisdiction of the classifying draft boards. Their expressions of willingness to manufacture many types of goods intended for military consumption (*supra*, pp. 5, 8, 9) and the similar statements made by the pastor of the Harshmanite church (*supra*, p. 3) provide a basis in fact for the conclusion that they were not "conscientiously opposed to participation in * * * noncombatant service," assuming that the appeal board was not misled as to the applicable standard or ultimate question by the Department recommendation. There was no unfairness in the established administrative procedures followed in classifying the petitioners; any possible impropriety in the standards applied by the local boards was cured by the *de novo* reclassification of the petitioners by the appeal board.

A. PETITIONERS WERE NOT ENTITLED TO INTRODUCE EVIDENCE AT THE TRIAL BEARING UPON THEIR CLASSIFICATIONS

At his trial, each petitioner offered proof that Community Industries never manufactured "war goods," that they were not willing to manufacture goods for military consumption, and that they entertained certain religious beliefs (H.R. 29, 30, 35, 38–40; P.R. 18, 19–23, 24–26, 27, 28–30, 32–33, 34, 37–41).[1] The court declined to permit such evidence, explaining (H.R. 31, 32):

> But I am not trying this man's classification de novo. My obligation was to examine the file as it has been admitted into evidence and to determine whether there was a basis in fact. Now I can't see how it would profit us to get into a dispute here as to whether this witness is right as against some statements that might have been made in the exhibit.

The court in No. 516 ruled to the same effect (P.R. 18, 23, 33).

These rulings were correct inasmuch as it was not the jury's function to determine the propriety of petitioners' classifications or to consider whether petitioners were entitled, on the basis of their religious beliefs, to 1–O exemptions. *Cox* v. *United States*, 332 U.S. 442, 453; *Reed* v. *United States*, 205 F. 2d

[1] In No. 516, the court granted the government's motion to strike the testimony of the witness Felix Hagerman "in so far as it pertain[ed] to the defendant's Selective Service classification," to the tenets of the Harshmanite Church and to "any testimony * * * which related to the products which Community Industries may or may not have manufactured" (P.R. 23).

216, 217–218 (C.A. 9), certiorari denied, 346 U.S. 908; *Roberson* v. *United States*, 208 F. 2d 166, 167–168 (C.A. 10).

This is not even the function of the trial judge. At the criminal trial, the trial judge does have a duty to determine, on the administrative record, whether there was a basis in fact for the particular classification given. If such basis in fact is found to exist, the classification of the Selective Service system is lawful and must be accepted. See *Witmer* v. *United States*, 348 U.S. 375, 380–381; *Estep* v. *United States*, 327 U.S. 114, 122–123; *Cox* v. *United States*, *supra*, 332 U.S. at 453; *Dickinson* v. *United States*, 346 U.S. 389, 396.

The record in each case shows that petitioners were given and took advantage of their opportunities personally to appear before the local boards in support of their claims to I–O exemptions, to traverse the Departmental recommendations to the appeal board, and to have placed in their Selective Service files any material deemed relevant to their religious beliefs and the tenets of the Harshmanite Church. They were properly denied leave, at their criminal trials, to reopen the question of classification or augment the administrative record with new materials.

B. PETITIONERS WERE NOT ENTITLED TO PRODUCTION OF THE HEARING OFFICER'S REPORTS TO THE DEPARTMENT OF JUSTICE

During the administrative proceedings, petitioners received copies of the advisory recommendations of the Department of Justice to the appeal board and résumés of the investigative reports. See *Gon-*

sales v. *United States*, 348 U.S. 407; *Simmons* v. *United States*, 348 U.S. 397. At the trial, the district court refused petitioners' requests for production of the hearing officer's reports (H.R. 22; P.R. 9). Contrary to petitioner's contentions (Pet. Br. No. 515, 52–56; Pet. Br. No. 516, 42–46), these rulings were correct.

In *Gonzales* v. *United States*, 364 U.S. 59, this Court held that there was nothing in the Universal Military Training and Service Act which required that the hearing officer's report be made part of the registrant's file and automatically forwarded to the appeal board (364 U.S. at 63–64):

> Section 6(j) of the Act, as we have held, does require the Department's recommendation to be placed in a registrant's file. *Gonzales* v. *United States*, *supra*. But there is nothing in the Act requiring the hearing officer's report to be likewise turned over to the registrant. While the regulations formerly required that the hearing officer's report be placed in the registrant's file, this requirement was eliminated in 1952. Moreover, the hearing officer's report is but intradepartmental, is directed to the Attorney General and, of course, is not the recommendation of the Department. It is not essentially different from a memorandum of an attorney in the Department of Justice, of which the Attorney General receives many, and to which he may give his approval or rejection. It is but part of the whole process within the Department that goes into the making of the final recommendation to the appeal board.

> It is also significant that neither this report nor the hearing officer's notes were furnished to the appeal board. Hence the petitioner had full opportunity to traverse the only conclusions of the Department on file with the Board.
> * * *

There is an additional reason why the hearing officer's report in this case could not properly be demanded at trial after the administrative proceedings were concluded: neither petitioner, during the course of the administrative proceedings, ever disputed any relevant aspect of the Department's summation of these reports. Petitioners were sent copies of the Department's recommendations to the appeal board. In their letters to the appeal board responding to these recommendations, they challenged only the accuracy of the statements attributed to them by the hearing officer that one of their reasons for non-acceptance of the I-A-O classification was the Commandment, "Thou shalt not kill", stating that they had based their attitudes in this regard on the teachings of the New Testament (H.S.R. 73-76; P.S.R. 56-58). But the sincerity of petitioners' opposition to combatant military training and service was never at issue in the administrative proceedings; there was no dispute that they were conscientiously opposed to killing. Petitioners were given notice of and had full opportunity to challenge, during the administrative proceedings, the statements attributed to them in the Department's summations of their hearings. Neither petitioner disputed any relevant portion of the summations, and their responses to

these summations never advised the appeal board that there was disagreement as to their position on the manufacture of goods for the military services.

The purpose served by requiring that any challenge to the Department's summation of the hearing officer's report be made first at the administrative level is to put the Department of Justice and the Selective Service System on notice of the particular complaint so that any further action deemed necessary may be undertaken at the administrative level. Under such circumstances, the Department might voluntarily transmit copies of the hearing officer's report to the appeal board for consideration and transmission to the registrant, or it might supply supplementary data concerning the Departmental hearing. The appeal board might request the Department of Justice to supply copies of the hearing officer's report or transmit additional information as to the proceedings before the Departmental hearing officer. See 32 C.F.R. 1626.24 and 1626.25. The appeal board might return the Selective Service file to the local board with instructions to supply "additional information" or take additional action to make the file complete so

[2] Petitioner Harshman stated that he could not understand how the Department of Justice could call "untenable" the distinctions which he made between participation and nonparticipation in war (H.S.R. 75–76). Petitioner Parker, in addition to restating his religious objection to all forms of military training and service, challenged the Departmental conclusions by pointing out that the "goods that we manufactured for use in the Army or Navy could be used by civilians too. The goods that we manufacture is not directly involved in killing and fighting" (P.S.R. 56–58).

as to "enable the appeal board to determine the classification of the registrant." 32 C.F.R. 1626.23. There is nothing in the regulations which would deny the appeal board the authority to direct the local board to accord the registrant a further personal appearance in order to amplify the particular matter in dispute. Cf. 32 C.F.R. 1624.1 and 1625.3.

In the absence of any objection to the Department's summation of what each petitioner said to the hearing officer, the appeal board was entitled to assume that the Departmental summation was not disputed and to act on this assumption. It is not open to a registrant to reserve any objection to the accuracy of the Department recommendation until after the appeal board has acted and then challenge the factual basis of the board's conclusion on a ground never presented to the board itself.

C. REVERSIBLE ERROR WAS NOT COMMITTED BY THE DISTRICT COURT IN SENDING PETITIONERS' SELECTIVE SERVICE FILES TO THE JURY DURING DELIBERATIONS

In each case, petitioners' Selective Service files were introduced into evidence as government exhibits. In No. 516, when petitioner Parker sought to introduce testimony concerning his religious beliefs and the tenets of the Harshmanite Church, the court, in sustaining the government objections, told counsel for the petitioner on two occasions that petitioner's religious views were contained in his Selective Service file which it intended to send to the jury (P.R. 22, 29). Petitioner's only objection to this was that some of the documents contained in the file were

hearsay (P.R. 29). In No. 515, the court did not indicate that it would send the Selective Service file to the jury. There is nothing further in either record to indicate whether in fact the court did submit the files to the jury (see H.R. 58, 59; P.R. 55).

Assuming that the court in each case did send the files to the jury, such action, though technically incorrect (see *Cox* v. *United States*, 332 U.S. 442), did not prejudice the petitioners or adversely affect their substantial rights since the court explicitly instructed the jury that they were not to concern themselves with the matter of classification. In each case, the court instructed the jury that the question of determining legality of the particular classification was one exclusively within the province of the trial court; that the jury was not to consider petitioners' classifications because under the law it was not an issue for them to consider; that, after an examination of the Selective Service files, the court had determined that the classifications had basis in fact and were therefore lawful; and that the only question for determination by the jury was whether the petitioners willfully refused to submit to induction (H.R. 51–52; P.R. 48–49). The jury must be presumed to have followed these explicit and clear-cut instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95. In any event, the evidence on the only issue for jury determination—whether petitioners wilfully refused to submit to induction—was virtually undisputed. There is absolutely no doubt that both petitioners knowingly and intentionally refused to submit to induction.

D. PETITIONERS' DE NOVO CLASSIFICATIONS—UPON WHICH THE ORDERS TO REPORT FOR INDUCTION WERE BASED—WERE MADE IN ACCORDANCE WITH PROPER STANDARDS AND CURED ANY PRIOR IMPROPRIETIES OR PREJUDICE AGAINST THE PETITIONERS BY MEMBERS OF THE LOCAL BOARD

There is no substance to petitioners' contention (No. 515, 40–42; No. 516, 30–32), that "clearly expressed bias and prejudice" by members of the local board tainted the entire classification proceedings. Each petitioner was reclassified in new and independent proceedings long after the incidents giving rise to the claims of prejudice, and it was these reclassifications in class I–A–O which formed the basis for the orders to report for induction.

In No. 515, petitioner Harshman was reclassified I–A–O in independent proceedings before the appeal board in May 1957—three and one half years after local board member Glancy allegedly told the petitioner that he did not believe there was "any such thing as a conscientious objector" and almost one and one half years after other alleged similar remarks were made by other board members. Petitioner complained to the appeal board regarding Glancy's remark and the other alleged remarks, stating that the local board had not given him "unbiased consideration" of his claim to a I–O exemption (H.S.R. 45–47, 63–64, 73–76). The appeal board specifically rejected the local board's conclusions regarding petitioner's classification and "accordingly ignor(ed) those conclusions * * *" (H.S.R. 77). After considering the entire Selective Service file and the advisory recommendation of the Department of Justice (see 32

C.F.R. 1626.24), the board reached the "independent conclusion" that the petitioner, while conscientiously opposed to combatant military training and service, did "not actually conscientiously object to noncombatant service" and classified him I–A–O (H.S.R. 77).

The proceedings before the appeal board were not addressed to correcting errors at the lower board level; they were *de novo* classification proceedings by another board which gave "consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant * * *." 32 C.F.R. 1626.26; see 32 C.F.R. 1626.23, 1626.24 and 1626.25. Thus, any prejudice or improprieties at the local board level did not affect petitioner's classification before the appeal board which specifically rejected and ignored the conclusions reached by the local board. The appeal procedure would have little utility in the Selective Service system if errors before a local board, which the appeal board recognized and avoided, were deemed, without more, to infect the appellate classification.

In No. 516, the alleged prejudicial remark in September 1956 by local board member Bone—that the board would not give the I–O exemption to anyone—clearly did not affect petitioner's final reclassification in May 1960. Not only was there a *de novo* classification of I–A–O by the appeal board in December 1957, but in May 1960—three and one half years after the alleged prejudice—the local board reopened and considered anew petitioner's classification (P.S.R. 2, 7, 49, 59). There is nothing in the record to indicate

that either of these reclassifications was affected in any degree by the alleged isolated remark of Mr. Bone or, indeed, by any bias or prejudice against the petitioner or members of his church. Moreover, the 1960 classification—the one which formed the basis for petitioner's order to report for induction—was by a board panel which did not include Mr. Bone.

Under these circumstances, therefore, it was immaterial, so far as petitioners' final classifications were concerned, whether the local board applied proper standards in proceedings long antedating the final actions of the appeal board and, in No. 516, of the local board. Defects or prejudice at the local board level, which did not enter into the final reclassifications could not invalidate those *de novo* proceedings. *Reed* v. *United States*, 205 F. 2d 216, 218 (C.A. 9), certiorari denied, 346 U.S. 908; *United States* v. *Chodorski*, 240 F. 2d 590, 591 (C.A. 7), certiorari denied, 353 U.S. 950; *United States* v. *Hartman*, 209 F. 2d 366, 368 (C.A. 2); *Tyrrell* v. *United States*, 200 F. 2d 8, 11 (C.A. 9), certiorari denied, 345 U.S. 910; *Davis* v. *United States*, 203 F. 2d 853 (C.A. 8), certiorari denied, 345 U.S. 996; *Cramer* v. *France*, 148 F. 2d 801 (C.A. 9).

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[3] Petitioner's classification in September 1956 was by a board vote of 4–0, and was initialed by board members as follows: "EWM", "JAS", "HLB" and "DLW" (P.S.R. 7). Petitioner's classification in May 1960 was by a board vote of 3–0, and was initialed by board members as follows: "JAS", "PLS", and "DDH" (P.S.R. 7).

CONCLUSION

For the reasons stated, the United States moves the Court to remand the cases to the Court of Appeals with directions to vacate its judgments and to direct the district court to vacate its judgments and to dismiss the indictments.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

MARCH 1963.

APPENDIX A

Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), provides in pertinent part:

> Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the

local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the persons concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration

to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Selective Service Regulation Number 1626.25, 32 C.F.R. 1626.25, provides:

(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I–O or in Class I–O. If the appeal board finds that the registrant is eligible for classification in Class I–O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I–O or in Class I–O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined

that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply

concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

Selective Service Regulation Number 1626.26, 32 C.F.R. 1626.26, provides in pertinent part:

(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

Appendix B

March 12, 1963

Memorandum to Chief, Conscientious Objector Section, Department of Justice.

Re Effect on claims for exemption from noncombatant service of willingness to perform defense work.

In two cases now pending before the Supreme Court of the United States (*Harshman* v. *United States*, No. 515, and *Parker* v. *United States*, No. 516), the recommendations of the Department to the Selective Service Appeal Board appear to be susceptible of an interpretation which would reflect an erroneous view of the law applicable to the above subject. The recommendations can be interpreted as implying that even if a registrant is sincerely and conscientiously opposed to noncombatant service, he cannot, as a matter of law, qualify for an exemption from such service if he is engaged or states that his beliefs would permit him to engage as a civilian in production of materials for the armed forces. I have been advised by the Assistant Attorney General in charge of the Office of Legal Counsel that this view of the law is not taken by your section or by his Office. However, in view of the fact that this question has been raised I wish to insure that all necessary action is taken to eliminate any possibility of misunderstanding that may have arisen on the part of the Department's personnel as to the proper legal standards in this regard.

In every case of a claim for exemption from noncombatant service, the ultimate issue is whether the

registrant is "conscientiously opposed to participation in * * * noncombatant service" within the meaning of 50 U.S.C. App. § 456(j). This issue does not, of course, arise unless the registrant has established his eligibility for the lesser exemption from combatant training and service by demonstrating that he is "conscientiously opposed to participation in war in any form." In determining the genuineness and sufficiency under the statutory standards of a registrant's claimed beliefs, it is proper for consideration to be given to his attitudes and beliefs regarding participation in defense work as a civilian. Indeed, a registrant's willingness to earn his living by producing materials for the armed forces may of itself provide an adequate basis for concluding that the registrant is not "conscientiously opposed to participation in * * * noncombatant service." However, such evidence does not always or necessarily have that effect. Cases may be readily imagined in which the registrant's beliefs would permit some degree of participation by him in some kinds of defense-related civilian activity, yet still would qualify him for the exemption. The issue is generally whether the registrant is sincere in his claimed beliefs, and logical inconsistency on his part, while always relevant as a factor to be considered, is not necessarily decisive.

Please be good enough to inform the Selective Service System of the contents of this memorandum and request that agency to inform its appeal boards. Also, please take all action necessary to insure that Department personnel who are engaged in the processing of appeals in this type of case, including hearing officers, are appropriately informed.

ROBERT F. KENNEDY,
Attorney General.

U.S. GOVERNMENT PRINTING OFFICE 1963